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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1397

PATRICIA DROWN,

Petitioner,

v.

PORTSMOUTH SCHOOL DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Patricia Drown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on December 18, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, reprinted in Appendix A to this Petition,[1] is not yet reported. No opinion was rendered by the United States District Court for the District of New Hampshire. The Order of the District Court, reprinted at page 15 of the

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[1] Referred to throughout this Petition as "App. A."

Appendix to Appellant's Brief[2] in the Court of Appeals, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1970, and is reprinted in Appendix B to this Petition.[3] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a suit brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, petitioner raised two constitutional issues: (1) whether a nontenured teacher's rights of substantive due process under the Fourteenth Amendment of the United States Constitution are violated when a public educational institution refuses to renew the teacher's contract without providing any reason or justification, and (2) whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with adequate prior notice and the opportunity for a hearing.

The Court of Appeals below answered the first question in the affirmative, requiring school authorities to supply a teacher with "a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file" (App. A, *infra* at 7a). Petitioner seeks no review of this determination.

The lower court, however, also held that under no circumstances did petitioner have a constitutional right to an administrative hearing on the nonrenewal of her contract—even if the nonrenewal had been in retaliation for petitioner's exercise of First Amendment rights or if the reasons for the nonrenewal had been arbitrary or otherwise constitutionally impermissible.

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[2] Referred to throughout this Petition as "R."

[3] Referred to throughout this Petition as "App. B."

The question presented before this Court, therefore, is whether the lower court was in error in refusing to find that a public educational institution's failure to provide a nontenured teacher with a hearing on the institution's determination not to renew the teacher's contract violates the teacher's rights of procedural due process under the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the Fourteenth Amendment of the United States Constitution are as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

2. The pertinent provisions of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[4]

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[4]The Court of Appeals in its opinion makes reference to N.H. Rev. Stat. Ann., ch. 189, § 14-a, which provides in pertinent part as follows:

> "Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or reelected. Any such teacher who has taught for three or more years in the same school district and who has been so

STATEMENT

Petitioner, a high school teacher whose performance had been rated "satisfactory" (R. 10), and whose quality of teaching had been extolled as having "relevancy" and as being "stimulating" (R. 13), was suddenly informed in March 1970 that her teaching contract would not be renewed for the next school year. No reason for the nonrenewal, nor any opportunity to question the decision in a hearing, was given by the school authorities (*see* R. 5, 6, 12).

The facts and circumstances relating to the nonrenewal of petitioner's contract and her subsequent action, claiming a deprivation of constitutional rights in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, are set forth below.

Petitioner was a teacher of English in the Portsmouth, New Hampshire, High School during the 1968-69 and 1969-70 school terms (*see* R. 3, 9). She had previously taught in the Chicago public school system from September 1966 to June 1968 (R. 9).

On March 12, 1970, the high school principal and the assistant superintendent of schools had a meeting with petitioner. At the meeting, the assistant superintendent informed petitioner that "he had heard a lot of rumors" about her, and requested that, because she was "unhappy with the school system," she should resign her position at the high school effective June 1970 (R. 11). Thereafter, petitioner received a letter from the assistant superinten-

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> notified may request in writing within five days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected. The school board upon receipt of said request, shall provide for a hearing on the request to be held within fifteen days. The school board shall issue its decision in writing within fifteen days of the close of the hearing."

Petitioner asserts that, even though she derives no right to a hearing from the statute, her right to such hearing is governed and protected by the Fourteenth Amendment. In an action under the Civil Rights Act, the New Hampshire statute is not controlling.

dent, "dated March 10, 1970 informing her that she would not be offered a contract for the 1970-71 school year" (*id.*). No reasons for the nonrenewal of the contract were given in the letter (*see* R. 5).

On March 15, 1970, petitioner wrote to the assistant superintendent, requesting a hearing as well as a list of reasons for the nonrenewal of her contract (R. 11). On March 17, the assistant superintendent, in reply, denied petitioner's request for a hearing and failed again to provide her with reasons for the nonrenewal of her contract (*id.*).

Aside from petitioner's alleged "unhappiness" with the Portsmouth school system and the undefined "rumors" about her (*see* R. 10-11), no reason for petitioner's contract nonrenewal was evident. There is nothing in the Record before the lower court even hinting that petitioner may have been incompetent or otherwise incapable of instructing in the subject assigned to her. In her *uncontested* affidavit, petitioner stated that she had "conducted her classes in a competent, professional manner"; had "attempted to bring the highest quality of teaching to her classroom"; had "always maintained high standards in the classroom"; and had "always been ready to listen to objective, professional criticism regarding the improvement of her classroom presentation" (R. 9-10). She further claimed that she had "done a good job in teaching at Portsmouth High School and that until March, 1970, the school administration [had] never indicated to her that her classroom teaching was anything less than excellent" (R. 10).[5]

In support of the statements in her affidavit, petitioner attached to the affidavit (*see id.*) a letter from the high school's assistant principal, dated March 15, 1969, marked "Exhibit A" (R. 13), extolling the high quality of her teaching:

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[5]The Court of Appeals characterized petitioner's four years of teaching as constituting "apparently satisfactory performance" (App. A, *infra* at 5a).

> "I was particularly impressed with the relevancy which you brought to your classes. Certainly this is an important way to involve young people in poetry and literature.
>
> "It was evident in the give and take that there was a mutual student-teacher respect. The manner in which you questioned your students was stimulating.
>
> * * *
>
> "Your teaching is in every respect satisfactory. It is a pleasure to have you at Portsmouth High School."

One year later, and just a few days prior to the nonrenewal of petitioner's contract, the assistant principal evaluated petitioner a second time, and noted that petitioner had been "performing satisfactory work in the four categories of said evaluation report" (R. 10).

As for her conduct while a teacher in Portsmouth, petitioner stated that she had "criticized and suggested improvements in the Portsmouth High School in areas of her responsibility including changes in the curriculum of the English Department" (R. 11). She believed that it was "the duty and obligation of a teacher to express her views on subjects directly relating to the manner and methods of teaching" and that her "criticisms were reasoned, logical suggestions for improvement of the school system and in no way were detrimental to said school system or detrimental to the conduct of her classes and areas of responsibility" (R. 11-12).

Following the school board's denial of her request for a hearing, petitioner brought suit in the Federal District Court for reinstatement and damages, pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. The District Court entered a brief order without opinion, denying petitioner's motion for summary judgment (R. 8) and granting defendants' motion to dismiss (R. 7-8) "on the grounds that the complaint fails to state a cause of action under Title 42 United States Code, Section 1983" (R. 15).

On appeal, the First Circuit vacated the judgment of the District Court and remanded the cause for further proceedings (App. B, *infra*). The court held that (App. A, *infra* at 7a)–

> "the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file."[6]

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[6]On December 29, 1970, eleven days after the decision by the First Circuit, the Portsmouth school authorities wrote petitioner the following letter:

> "Dear Mrs. Drown:
>
> "You were not offered a contract to teach in the Portsmouth School System for the 1970-71 school year for the following reasons:
>
> "1. In October 1969 you reported illness as a reason for not being able to teach on a particular day, yet you attended an Assembly of Delegates meeting. You were not a delegate to that meeting nor had you requested permission to attend.
>
> "2. While your class work was assessed as 'satisfactory', the English Department at the High School reports that you have been uncooperative, disregarding schedules and not accepting direction.
>
> "3. You were asked to attend a meeting with the Assistant Superintendent, Mr. Ryans and Mr. Thorburn to discuss your situation on February 19, 1970 at 1:30 P.M. per letter of Mr. Thorburn and also oral request, yet you refused to attend this conference. This refusal was forwarded in letter form to Messrs. Cusick, Thorburn and Ryans.
>
> "Of course you are entitled to access to the evaluation reports in your personnel file.
>
> "Sincerely,
>
> /s/ James J. Cusick
> Assistant Superintendent"

At the same time, the court rejected petitioner's argument "that the right to a statement of the reasons for not being rehired is meaningless unless the school board can be forced to prove those reasons at a hearing" (*id.* at 7a-8a). The court held instead that, under no circumstances, did an untenured teacher have a federal constitutional right to an administrative hearing when his contract was not renewed, even if the nonrenewal was for constitutionally impermissible reasons.[7]

REASONS FOR GRANTING THE WRIT

The issue in the present case—whether the due process clause of the Fourteenth Amendment requires a public educational institution to grant a nontenured teacher a hearing when the institution determines not to renew the teacher's contract for the next academic term—is exactly the same as one of the issues now pending on a petition for a writ of certiorari before this Court in *Perry v. Sindermann*, No. 952, O.T. 1970. It is also closely related to the question whether such a hearing is constitutionally required when a public educational institution dismisses a nontenured teacher during his contract term. This latter issue has been raised in *Fenton v. Boston School Committee*, No. 1026, O.T. 1970, now pending before this Court on appeal. Because of the similarity of the issues in the *Perry*, *Fenton* and present cases, this Court should grant certiorari in the present case

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[7] The court observed that its solution to the problem presented was novel and therefore applied its ruling in the following manner (App. A, *infra* at 12a-13a):

> "We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied."

and set it for oral argument jointly with the other two cases.[8]

I. THE DECISION BELOW ADDS TO AN AS YET UNRESOLVED CONFLICT AMONG THE CIRCUITS ON THE PROCEDURAL DUE PROCESS ISSUE

In holding that a nontenured teacher whose contract has not been renewed has no constitutional right to an administrative hearing, even if the contract nonrenewal has been for constitutionally impermissible reasons, the First Circuit has added to an as yet unresolved conflict of the circuits. Aligning itself with the Eighth Circuit in *Freeman v. Gould Special School Dist.*, 405 F.2d 1153, *cert. denied*, 396 U.S. 843 (1969), and the Fourth Circuit in *Parker v. Board of Educ.*, 348 F.2d 464, *affirming*, 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), the First Circuit has set itself in diametrical conflict with the Fifth Circuit's position that an untenured teacher in a public educational institution has a constitutional right to an administrative hearing prior to the nonrenewal of his teaching contract if the teacher has an expectancy of reemployment,[9] or if he alleges that a constitutionally impermissible reason motivated the decision of contract nonrenewal. *Ferguson v. Thomas*, 430 F.2d 852, 856-57 (5th Cir. 1970); *Lucas v. Chapman*,

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[8]The suggestion of setting the *Perry* and *Fenton* cases together for oral argument was recently made by the National Education Association in its *Amicus Curiae* Memorandum (p. 4) in the *Fenton* case.

[9]The First Circuit stated that it was not impressed by the Fifth Circuit's distinction between nontenured teachers who had an expectancy of reemployment and those who did not. "Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right" (App. A, *infra* at 4a n. 3).

430 F.2d 945, 948 (5th Cir. 1970); *Sindermann v. Perry*, 430 F.2d 939, 943-44 (5th Cir. 1970), *petition for a writ of certiorari filed*, No. 952, Sup. Ct., O.T. 1970, Nov. 9, 1970.

The First Circuit's decision is also in conflict with the decisions of several federal district courts which have held that such a nontenured teacher is entitled to an administrative hearing even if he has no "expectancy of reemployment" or makes no allegation that the decision not to renew the contract was made for constitutionally impermissible reasons. *Orr v. Trinter*, 318 F. Supp. 1041 (S.D. Ohio 1970); *Roth v. Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970).

There is a vital need to resolve this conflict of judicial authorities. The procedural due process issue presented here arises with great frequency in teacher contract termination cases. Aside from the three cases now pending before this Court, we are aware of at least three additional cases, raising the same procedural due process issue, which are now pending on appeal in the federal courts of appeal. *Orr v. Trinter*, Dkt. No. 20721, 6th Cir.; *Roth v. Board of Regents*, Dkt. No. 18490, 7th Cir.; *Shirck v. Thomas*, Dkt. No. 18790, 7th Cir. Many similar cases are pending in the federal district courts and in State courts.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Certiorari should also be granted because the holding of the court below, that a teacher's contract may be terminated without a hearing, conflicts with this Court's holding in *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). *Slochower* involved the summary dismissal of a professor at a city university under a New York City charter provision terminating the office or employment of any city employee who invoked his Fifth Amendment privilege against self-incrimination to avoid answering a question relating to his

official conduct. This Court reversed the dismissal of the complaint (*id.* at 559) on the ground that there had "not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302. . . . " The Court held that "summary dismissal of appellant violates due process of law" (350 U.S. at 559). In so holding, the Court explained (*id.*):

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here."

The present case also conflicts in principle with this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that a recipient of welfare benefits has a constitutional right to notice and an administrative hearing prior to termination of such benefits.[10] *Accord, Wheeler v. Montgomery*, 397 U.S. 280 (1970). Relying upon *Slochower* as a guide to its decision, the Court in *Goldberg* observed: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment" (397 U.S. at 262).

In *Goldberg*, the Court, applying the "balancing test" of *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), found that the private interest involved in requiring a pretermination hearing far outweighed any conflicting governmental interest (397 U.S. at 264):

> "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid pending resolution of a controversy over eligibility may

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[10] Such welfare benefits, said the Court, were "entitlements" to be regarded "more like 'property' than a 'gratuity' " (397 U.S. at 262 n. 8).

> deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Recently, in *Ricucci v. United States*, 425 F.2d 1252, 1257 (Ct. Cl. 1970) (concurring opinion), the private interest deemed to be affected by the termination of welfare benefits in *Goldberg* was likened to the private interest considered to be affected by the discharge of a government employee:

> "All of the foregoing could be, and probably should be applied to most discharged government employees. Few of them earn more than enough to pay their living expenses from month to month, and when their salaries are cut off they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. In any event, if there is any difference, it is only a matter of degree."

Comparable considerations are at stake when a nontenured teacher's contract is not renewed.

Finally, the present case conflicts in principle with this Court's ruling in *Wisconsin v. Constantineau*, 39 U.S. L. Week 4128 (Jan. 19, 1971), which held the Wisconsin "posting" statute unconstitutional for failure to accord any procedural due process. In *Constantineau*, this Court declared: "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" (*id.* at 4129).

Several lower federal courts similarly have recognized that the nonrenewal of a nontenured teacher's contract adversely affects a teacher's good name and professional reputation and have accordingly required the procedural due process protection of prior notice and a hearing.

In *Roth v. Board of Regents*, 310 F. Supp. 972, 979 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir., the district court stated that "nonretention . . . creates concrete and practical difficulties for a professor in his subsequent academic career," and that, "in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent." The court concluded that "[s]ubstantive constitutional protection . . . against non-retention in violation of . . . First Amendment rights or arbitrary non-retention is useless without procedural safeguards" (*id.* at 979-80).

In *Orr v. Trinter*, 318 F. Supp. 1041, 1046 (S.D. Ohio, 1970), *pending on appeal*, Dkt. No. 20721, 6th Cir., the district court agreed that a nontenured teacher whose contract is not renewed "indisputably . . . faces the possibility of some damage to his professional reputation and to his ability to pursue his chosen profession." The *Orr* court further noted that "this interest of plaintiff in his professional standing and reputation is separate and apart from any interest in a particular job" (*id.* at 1045). The court consequently held (*id.* at 1046):

> "[T]he interests of the school board and those of the teacher will both be fully protected by a procedure which advises the nontenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined."[11]

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[11] *Accord*, Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984, 992 (W.D. Wisc, 1970): "[A school] board's ultimate decision may not rest on a basis of which the teacher was never notified, nor may it rest on a basis to which the teacher has no fair opportunity to respond"; Domenicone v. School Committee of Smithfield, R.I. Comm'r. of Educ., May 20, 1970, at 4 (unreported) (holding that the nonrenewal of a nontenured teacher's contract "can mean the end of [the teacher's] professional career" and that therefore procedural due process was required); *cf.* Birnbaum v. Trussel, 371 F.2d 672 (2d Cir. 1966); Meredith v. Allen County War Mem. Hosp. Comm'n., 397 F.2d 33 (6th Cir. 1968).

III. THE DECISION BELOW WILL HAVE A DELETERIOUS EFFECT ON THE PROTECTION OF THE SUBSTANTIVE CONSTITUTIONAL RIGHTS OF TEACHERS

Although the lower court required that a public educational institution must give a written explanation of the reasons for nonretention, it provided no means for determining the validity of those reasons within the administrative structure. Even in those instances in which the teacher asserts a violation of specific constitutional rights, such as nonrenewal of his contract in retaliation for the exercise of First Amendment rights, or in which the teacher asserts that the school authorities acted in bad faith, the court of appeals held that an administrative hearing is not constitutionally required. As the court explained (App. A, *infra* at 10a):

> "[T]he teacher asserting a constitutional right has guaranteed access to the federal courts . . . . As to the teacher's interest in guarding against bad faith decisions, we first observe that . . . the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. . . ."[12]

[12] The court also stated (App. A, *infra* at 10a): "It is not easy for us to believe that a significant number of decisions not to rehire nontenured teachers rest on either ground." *But see* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L.J. 841 n.† (1970): "In the past academic year alone, the American Association of University Professors acted on nearly 750 complaints." *See also id.* at 859; Brief of the National Education Association as *Amicus Curiae*, Jones v. Hopper, 397 U.S. 991 (1970) (*denying cert.*), at pp. 1a-4a, setting forth a parial listing of decided and pending cases involving the nonrenewal of contracts of nontenured teachers in retaliation for the exercise of First Amendment rights.

It should also be noted that, if the First Circuit's concept of a "bad faith" decision by school authorities is narrowly interpreted to confine the availability of the federal courts to cases involving showings of actual malice, a wide range of arbitrary contract nonrenewal

The First Circuit's reliance on "guaranteed access" to the courts ignores the practical difficulties of litigation. Courts alone cannot effectively protect a teacher from the dereliction of school authorities. As stated by Professor William Van Alstyne in his recent article on *The Constitutional Rights of Teachers and Professors,* 1970 Duke L.J. 841, 859-60 (1970):

> "Faculty members are not litigious by nature, the costs of formal controversy are high and usually must be borne personally, the burden of proof—often exceedingly difficult to carry—falls upon the plaintiff-teacher, and the ordinary case may not reach judgment for months or even years after the plaintiff has been separated from his job. In addition, the teacher must face the practical recognition that the extralegal hazards of such litigation are themselves quite great: to sue and to lose establishes a public record against oneself as a teacher and may further prejudice one's chances for employment or advancement. To sue and to win will not permit one actually to resume teaching at the institution in most instances, and it will almost certainly spread upon the public record whatever evidence of the plaintiff's shortcomings the defending institution can muster—thereby warning other institutions which may be chary of seemingly irascible professors who sue their employer and 'launder their linen' in public places."

As a result of these practical difficulties, Professor Van Alstyne concludes that (*id.* at 860)—

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decisions would presumably be excluded from review. "The 'sincerity' of an administrator's decision can seldom be challenged; it is its reasonableness which is most often called into question. . . . [A]n arbitrary dismissal can arise from a multitude of motives; an attempt to control all the variations of administrative action by reference to a simple dualism of good or evil hinders adequate analysis and may help to mask patent injustice." Note, *Dismissal of Federal Employees—The Emerging Judicial Role,* 66 Colum. L. Rev. 719, 725-26 (1966) (footnotes omitted).

> "the effective protection of the substantive constitutional rights of teachers and professors may critically depend upon the availability of pretermination procedural due process. Post-termination judicial remedies for teachers, like post-suspension remedies for students or post-eviction remedies for tenants, are often simply too little and too late. . . ."[13]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 1971

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[13] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1453 (1968). There are also a number of positive values that an administrative adversary hearing fulfills. These values include the promoting of accuracy, fairness, accountability, visibility, impartiality, consistency and integrity in the administrative authorities. *See* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 Sup. Ct. Rev. 161, 184-90.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7667.

PATRICA DROWN,

Plaintiff-Appellant,

—v.—

PORTSMOUTH SCHOOL DISTRICT, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Jack B. Middleton, with whom *Peter B. Rotch* and *McLane, Carleton, Graf, Greene & Brown* were on brief, for appellant.

John C. Driscoll for appellees.

Bradley F. Kidder and *Nighswander, Lord, Martin & KillKelley* on brief for The New Hampshire School Boards Association, amicus curiae.

David Rubin, Richard J. Medalie, Alvin Friedman, and *Epstein, Friedman and Duncan* on brief for The National Education Association, amicus curiae.

December 18, 1970.

COFFIN, *Circuit Judge*. Appellant, a public school teacher, brings this action pursuant to 42 U.S.C. § 1983 against the Portsmouth School District, the administrator, and the school board members of the district. She claims that appellee's failure to offer her a teaching contract for the 1970-71 school year deprived her of rights guaranteed to her by the Constitution.

Appellant was employed as a non-tenured teacher for the 1968-69 and 1969-70 school years. For each year, she was employed under a standard one-year contract. Under New Hampshire law and pursuant to appellant's one-year contract, a non-tenured teacher may not be dismissed without cause and without being afforded certain procedural rights *during* the school year, and tenured teachers are entitled to similar safeguards if they are not rehired. N.H. Rev. Stat. Ann. ch. 186, § 13. But a failure to rehire a non-tenure teacher affords the teacher no rights other than to notification by March 15 of the school year. N.H. Rev. Stat. Ann. ch. 186, § 14-a.

Appellant was given timely notice that she would not be rehired for the 1970-71 school year. She sought and was denied a list of reasons for this decision and a hearing so that she might have an opportunity to challenge it. Her complaint, which was dismissed below as failing to state a cause of action, claims that she was not afforded due process by the school district. She argues that she was denied certain rights, principally that of a hearing when the school district decided not to rehire her.[1]

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[1] Along with the right to a hearing, appellant and the National Educational Association as Amicus Curiae, ask this court to detail other safeguards to which appellant is entitled, including (1) the right to cross-examine witnesses; (2) the right to present both oral

Appellant's contract with appellees implies that the school district has virtually unlimited discretion to rehire her or not. *See* Note, *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1099-1100 (1968). Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons. *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir., *en banc*, 1966), *cert. denied*, 385 U.S. 1003 (1967); *Albaum* v. *Carey*, 283 F. Supp. 3 (E.D. N.Y. 1968). *See generally*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-58 (1968); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 233-43 (1956). But appellant makes no claim of any violation of her collateral constitutional rights; she merely says that the process by which the decision not to rehire her was made does not comport with the fundamental fairness guaranteed her by the Fourteenth Amendment.

Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or

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and written arguments; (3) the right to retain counsel; (4) the right to a determination based solely on legal rules and the evidence adduced at the hearing; (5) the right to statement by the decision-maker of his reasons and of the evidence relied on; (6) the right to an impartial decision-maker other than the school board; (7) the right to a hearing on the record so that a verbatim transcript can be made; and (8) the right to be advised of these rights. Presumably, they would also include the right to judicial review.

the exercise of First Amendment rights. *Freeman* v. *Gould Special School District of Lincoln County, Arkansas,* 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969).[2] Others have held that a non-tenured teacher is entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Orr* v. *Trinter,* —— F. Supp. —— (S.D. Ohio, Aug. 3, 1970); *Roth* v. *Board of Regents,* 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge* v. *Joint School District No. 1,* 310 F. Supp. 984 (W.D. Wisc. 1970). Still others have taken a middle course, requiring administrative hearings only when there is an allegation that a constitutionally impermissible reason motivated the decision not to rehire. *Ferguson* v. *Thomas,* 430 F.2d 852 (5th Cir., 1970); *Sindermann* v. *Perry,* —— F.2d —— (5th Cir., Aug. 10, 1970).[3] We are faced with this precise question for the first time.[4]

To determine what, if any, procedures are required when a school board decides not to rehire a non-tenured teacher, we are required to balance the competing interests of the individual teacher and of the school board. *Cafeteria &*

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[2] For a critical analysis of this opinion, see Note, 44 N.Y.U. L. Rev. 836 (1969).

[3] The Fifth Circuit distinguishes between non-tenured teachers who have an expectancy of reemployment and those who do not. Those with an expectancy of reemployment are entitled to the full procedural rights of a teacher with tenure. We are not impressed by this distinction. Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right. *Cf. Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966).

[4] We have, however, decided an analogous case. In *Medoff* v. *Freeman,* 362 F.2d 472 (1st Cir. 1966), we held no hearing was required to guarantee due process to a dismissed probationary government employee who had been informed of the reasons for his dismissal.

Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961); *cf. Goldberg* v. *Kelly*, 397 U.S. 254 (1970); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, —— Duke L. J. —— (1970) (draft of article submitted by counsel). The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents.

The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher. In the present case the plaintiff, after four years of apparently satisfactory performance in Illinois and New Hampshire, confronts a decision not to rehire her without any reason given. This effectively forecloses her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.

Against this background of competing interests, we assess the benefits and burdens of the rights claimed by appellant. We first examine the effect on both the teacher

and the school authorities of a right to receive a detailed statement of reasons for non-retention, accompanied by access to any teaching evaluation reports.[5] From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally, the teacher would have the extra benefit of knowing where his performance failed to live up to expectations—a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. *E.g.*, Wash.

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[5] *See* Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. Kan. L. Rev. 27, 50-53 (1969).

Access to reports would seem to be a logical consequence of any right to receive a statement of reasons. To the extent that they are consistent with and foreshadow the reasons for non-retention, they both corroborate and give some depth to those reasons. To the extent that, as in the instant case, prior reports do not foreshadow dissatisfaction on the part of the teacher's superiors, the right to access would tend to restrain a board from assigning capricious reasons for its present dissatisfaction.

Rev. Code Ann. § 28.67.070 (1964).[6] As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy.[7] Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony.

We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.[8]

Appellant, however, argues further that the right to a statement of the reasons for not being rehired is meaning-

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[6] Alaska entitles a non-tenured teacher to a statement of reasons and a complete bill of particulars. Alaska Stat. § 14.20.180(a) (1962). Further discussions of varying state procedures can be found in Frakt, *supra* at 28-30; and *Developments in the Law—Academic Freedom*, *supra* at 1091-92.

[7] In fact, appellant in this case has received some such reports, possibly all that exist.

[8] A similar result, in a different employment situation, was reached in *Olson* v. *Regents of the University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969).

less unless the school board can be forced to prove those reasons at a hearing. As an initial response, we note that a hearing is not constitutionally compelled in all cases where individual rights may be impaired.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy, supra* at 894-95.

It is obvious that the kind of hearing sought by appellant, *see* note 1, *supra,* would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the tir. expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenized mediocrities.

Such risks and burdens for the school board might be tolerable if the right to a hearing gave promise of high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher. We therefore inquire as to the nature of these interests and the extent to which they would be served by a hearing.[9]

One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions—assuming, of course, that the teacher is aware of the objections, as he would be if detailed notice is given. A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.

There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protect-

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[9] We note, preliminarily, that in any such hearing the burden of persuasion, because of the subjective factors on which a school board may legitimately base its decision on rehiring, would rest on the teacher. For example, testimony concerning a teacher's failure to communicate enthusiasm to his students would have to be conclusory in nature—"He was, or was not inspiring". Even were we to require that appellant be given an administrative hearing, we think that she would have to bear the burden of persuading the decision-maker that the decision not to rehire her was an incorrect one; our research reveals no authorities who argue that the school board should bear the burden of proving its decision correct. *See, e.g.*, *Developments in the Law—Academic Freedom, supra* at 1092; Note, 44 N.Y.U. L. Rev. 836, 842-43 (1969).

ing himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. While an administrative hearing may help the teacher by way of flushing up constitutionally impermissible reasons, the chief beneficiaries are the school board itself, which can only profit from reviewing a decision before being subject to possible liability, and the courts, which do not seek unnecessary litigation.[10] From the teacher's point of view, there is little reason for him to prefer the prospect of two full scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. *See* W. Prosser, *Handbook of the Law of Torts,* § 126, at 1015-16 (3d ed. 1964). Moreover, an absolute safeguard against the possibility of covert bad faith would involve school boards delegating crucial rehiring decisions to third parties—a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith

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[10] We therefore normally require resort to available administrative hearing prior to initiation of a section 1983 action. See *Dunham* v. *Crosby,* —— F.2d ——, n. 2 (1st Cir., decided this date).

concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures.[11]

We recognize that there may, under our solution, be rare instances where an improperly dismissed teacher would not be adequately protected. We wish to stress, however, that our decision here is limited to the case of a non-tenured teacher whose contract is not renewed during a probationary period. Non-tenured teachers are made aware that they have no right to reemployment by their employment contracts which run for only one year and which entitle them to a hearing only if they are dismissed during the course of the year.[12] While it is true that the effect of a decision not to rehire may be the same as dismissal, the teachers have made a contract which entitles them to pro-

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[11] In *Roth* v. *Board of Regents, supra,* cited with approval by appellant, the court stated "[I]t is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer. . . ." 310 F. Supp. at 978. We find it difficult to believe that the scrutiny by either an administrative or a judicial hearing of a decision made on such nebulous but admittedly valid grounds would afford a teacher meaningful protection from arbitrary decisions.

Similarly, we think a requirement that a teacher be afforded an administrative hearing if he makes a constitutional claim or a claim of an actionable wrong, *see Sindermann* v. *Perry, supra,* offers the teacher little more protection than the status quo. Presently, the teacher can make such a claim in the courts, a forum undoubtedly more suited to evaluating them.

[12] Although the requirement that non-tenured teachers be notified by March 15 if they are not to be reemployed may be interpreted as giving the teacher a right to a continuing contract unless notified, the primary right is to notice, not to continued employment. Without a fixed date by which notice must be given, New Hampshire teachers might not have time to search for another job if they were not rehired. To compel school districts to notify teachers in time, the districts are required to offer a contract if they fail to give timely notice. Thus, while non-tenured teachers have a right to notice, they have no right to be rehired except to enforce the notice requirements.

cedural rights only when they are dismissed. Teachers are not powerless to change the terms of their contracts; the procedural rights of non-tenured teachers who are not rehired vary widely from state to state. *See Developments in the Law—Academic Freedom, supra* at 1091-92. Non-tenured teachers who do not like the terms of New Hampshire's contracts can either bargain to change them[13] or can seek employment in states where the terms are different. Thus, in balancing the interests of the school board and the teacher, we must remember that the teachers have agreed to the procedural scheme and that teachers are not powerless to alter the scheme or find employment under a different scheme.

Under the circumstances, we hold that a hearing is not required and that the interests of society, in promoting a better school system, and in protecting the rights of the individual, are best served by the solution we put forth. Since, however, this solution is novel, the defendant cannot in fairness be subjected to the sanctions which ordinarily accompany the violation of pre-existing law. *Cf. Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming

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[13] Since the provisions of New Hampshire's contracts are determined by law, this is not a normal collective bargaining situation, but to say that teachers cannot bargain to alter laws that affect the terms and conditions of their employment would require the court to shut its eyes to what has happened in the past few years in bargaining between public employees and their employers. *See generally,* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment,* 78 Yale L. J. 1107 (1969).

communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7667.

PATRICIA DROWN,
Plaintiff, Appellant,

v.

PORTSMOUTH SCHOOL DISTRICT ET AL.,
Defendants, Appellees.

JUDGMENT

Entered December 18, 1970

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day. Costs to appellant.

By the Court:

/s/ Dana H. Callup
Clerk